85-1098 (1)

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CRAIG VEVODA, KENNETH CHAMNESS AND MARK SOTTANA,

Petitioners,

vs.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian
Counsel of Record
100 Pine Street, Suite 770
San Francisco, CA 94111
Telephone: (415) 433-6330

Counsel for Petitioners Craig Vevoda, Kenneth Chamness, and Mark Sottana

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Do employees knowingly and voluntarily become union members, subject to union-imposed fines, where their union misleads them into believing that full membership is legally required?

2. Does a union's fraud preclude judicial enforcement of strike-levied fines?

3. When a union sues to enforce its membership contract (its constitution) to collect strike-related fines, does a federal court have jurisdiction to determine that the union's fraud renders the contract unenforceable?[1]

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[1] The only interested parties other than those designated in the caption are two labor organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and Teamsters Joint Council No. 7, both of which were plaintiffs in the District Court and neither of which appealed the District Court's judgment.

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The Petitioners, Craig Vevoda, Kenneth Chamness, and Mark Sottana, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Judicial Circuit entered on September 24, 1985.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is officially reported at 772 F.2d 530 and appears in Appendix "A", *infra* (pp. A1-A8). The decision of the United States District Court for the Northern District of California is officially reported at 587 F.Supp. 483 (1984) and appears in Appendix "B", *infra* (pp. B1-B6).

JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1985. No petition for rehearing having been filed, this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal statutes involved are Sections 7, 8(b)(1)(A), and 301(a) of the Labor-Management Relations Act (29 U.S.C. §§ 157, 158(b)(1)(A), and 185(a), hereinafter "LMRA") and Section 1337 of the Judicial Code (28 U.S.C. § 1337), all of which are set forth in Appendix "C", *infra* (pp. C1-C2).

Sections 1565, 1566, 1567, 1572, 1573, 1577, 1578, and 1689(b)(1) of the California Civil Code are also set forth in Appendix "C", *infra* (pp. C2 - C4). No constitutional provisions are implicated.

STATEMENT OF THE CASE

A. The Facts.[2]

Kenneth Chamness, Craig Vevoda, and Mark Sottana (hereinafter "Chamness", "Vevoda", and "Sottana") began their employment with Lucky Stores in October of 1975, June of 1976, and July of 1976, respectively. At that time and thereafter, the three were represented for purposes of collective bargaining by Milk Drivers and Dairy Employees Union, Teamsters Local 302 (hereinafter "Local 302" or "Union").

Within thirty days of their employment, Vevoda and Sottana went to Local 302's offices. Both were told by an employee of Local 302 that they had to complete a "membership application form" and attend an orientation meeting. Vevoda and Sottana each executed the membership application. During the orientation meeting they were told by Local 302's chief executive officer that they were required to take an oath of membership, which they did.

When Chamness began working for Lucky Stores, he was already a member of Local 302. Chamness had joined the Union in 1956 while working for Williams Dairy. Upon commencing work at Williams Dairy, Chamness obtained a "transfer slip" from Teamsters Local 78, a union in which he was already a member. He submitted this transfer slip to Local 302 and attended an orientation meeting

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[2] The facts are essentially as set forth in the Ninth Circuit's opinion. (*Infra*, pp. A1-A4.) The factual record before the District Court was uncontroverted. (*Infra*, p. B1.) Each of the petitioners filed declarations in support of their joint motion for summary judgment. The Union limited its response to legal argument.

conducted by an officer of Local 302. At the orientation meeting, Chamness was instructed to take an oath of membership, and did so.

As a result of the statements made by Local 302, Vevoda, Chamness, and Sottana all became and thereafter remained full-fledged members of Local 302, subject to its bylaws and the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its affiliated parent labor organization. Correspondingly, at all times, the "union security clause" included in the collective bargaining agreement in effect between Lucky Stores and Local 302 ostensibly required full union membership as a condition of employment. *(Infra,* p. A8.)

At no time were any of the three advised by Local 302 that they were not required to become or remain members of the Union. At no time were any of the three told that they had a right to resign their membership. None of the three would have chosen to become members or remain members had they known the truth.

In 1978, Vevoda, Chamness and Sottana were charged by the Union's chief executive officer with violating the Union's bylaws and the International's Constitution for allegedly working behind and/or crossing a picket line. After a "trial" at which they were found guilty, the Union fined Vevoda, Chamness and Sottana the sums of $5,143.16, $4,649.66, and $3,732.80, respectively. Their subsequent intra-union appeals were denied, and the decision sustaining the fines became final on July 31, 1979.

B. The District Court's Decision.

Some three years later, Local 302 filed a complaint in the Municipal Court of the State of California for breach of contract (Local 302's bylaws and the International's Constitution) seeking to collect these fines. The complaint was immediately removed to federal court pursuant to Section 301 of the LMRA.[3]

Chamness, Vevoda and Sottana asserted that the fines imposed upon them could not be judicially enforced because they had been fraudulently induced to become members of the Union, subject to its discipline. They jointly moved for summary judgment on the basis, among others, that the affirmative acts of Local 302 vitiated their consent to the contract Local 302 sought to enforce.

Reasoning that the validity of the fines was premised on the existence of a binding contract, the District Court found it necessary to consider, as with any contract, whether the contract was the result of free consent. Finding consent lacking, the District Court sustained the defense raised, holding:

> "Thus, these defendants have made an uncontroverted showing that they were misled by express statements

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[3] The District Court, *sua sponte*, questioned subject matter jurisdiction. Aware (1) that union fine actions were thought to be governed by state law (*NLRB v. Boeing Co.*, 412 U.S. 67 (1973); but see *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, n. 37 (1967)), and (2) that the existence of federal jurisdiction had yet to be decided (*Plumbers v. Plumbers Local 334*, 452 U.S. 615, n. 16 (1981)), the District Court concluded that the clear import of *Plumbers* mandated subject matter jurisdiction. In its Opinion, the Ninth Circuit did not address the issue other than to state that the District Court had jurisdiction under Section 301. (*Infra*, p. A1.)

> of union personnel into believing that they were required to become full members of the union in order to retain their jobs, and that they remained union members from the time that they first joined and throughout the strike only because they never learned of their right to resign from the union without forfeiting their jobs. This showing is sufficient to demonstrate that defendants did not knowingly and willingly subject themselves to the union's internal disciplinary provisions and procedures, thus precluding enforcement of the contract against them. The affirmative acts of union representatives in misinforming defendants that they were required to submit membership applications and to take the membership oath vitiated defendants' consent to enter into the contract which the union now seeks to enforce against them." *(Infra,* p. B2.)

The District Court rejected the Union's claim that the issue of whether Chamness, Vevoda, and Sottana voluntarily became or remained full union members was exclusively within the purview of the National Labor Relations Board ("NLRB"). (*Infra,* p. B3.) Focusing on the contractual issues presented by the Complaint, the District Court held that the defense asserted posed "no danger of *conflict* with any ruling of the NLRB or policy of the federal labor law." (Original emphasis; *infra,* p. B4.)

C. The Court of Appeals' Opinion.

The Ninth Circuit Court of Appeals reversed. The Court concluded that the issue of "voluntariness" was within the primary jurisdiction of the NLRB and therefore could not be entertained by the District Court. *(Infra,* p. A5.) Though acknowledging that the fines are enforceable only if a contractual relationship exists, the Ninth Circuit prohibits any inquiry into the validity of the contract.

Alternatively, but in the most perfunctory manner, the Ninth Circuit concluded that Local 302's actions were insufficient to vitiate the consent necessary to establish a valid contract. (*Infra*, pp. A6-A7.) This conclusion is contrary to California law as well as the duty of fair representation imposed on unions by this Court. In *toto*, the decision undercuts, if not destroys, the policy of employee freedom of association embodied in statute, legislative history, and this Court's decisions.

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REASONS FOR GRANTING THE WRIT

A. The Judgment Below Stands In Outright Defiance Of Fundamental National Labor Law Principles.

Because of the inherent inequality in the relationship between a union and its members, this Court has long been concerned with the right of a union to fine its members. *E.g., NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). Judicial tolerance of union-imposed fines has been expressly conditioned on a member's *voluntarily* undertaking the obligations of full-fledged union membership. *E.g., Scofield v. NLRB*, 394 U.S. 423, 435 (1969).

Recognizing (1) that the relationship between a union and its members is contractual (*NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973)), and (2) that, as a matter of law, nothing compels an employee to enter into the contractual relationship in the first instance (*NLRB v. General Motors Corp.*, 373 U.S. 734, 742-743 (1963)), this Court has reasoned that no federal policy bars enforcement of a *vol-*

untarily undertaken obligation. NLRB v. Allis-Chalmers Mfg. Co., supra. Indeed, even where members of the Court have disagreed, there has always been unanimity that the obligations of union membership must be freely and knowingly accepted to be enforceable. *E.g., Pattern Makers League of No. America v. NLRB,* — U.S. —, 105 S.Ct. 3064, 3082-3083 (1985) (Justice Blackmun dissenting).

Despite this twenty-year history, the Ninth Circuit refuses to consider whether Vevoda, Chamness, and Sottana voluntarily undertook the contractual obligation which resulted in their being fined. A defense expressly permitted by this Court and at the heart of federal labor policy has been categorically rejected by the Court of Appeals.

In rejecting jurisdiction, the Ninth Circuit has placed itself squarely in conflict with the exercise of jurisdiction required by *Vaca v. Sipes,* 385 U.S. 171, 186 (1967), over claims for a union's breach of the duty of fair representation - even though such claims arguably fall within the purview of the NLRB. In fact, Section 301 jurisdiction over analogous claims is expressly contemplated in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299-301 (1971). As a result, the Fourth, Fifth, Seventh, and District of Columbia Circuits have had no difficulty in finding jurisdiction over claims comparable to the defense rejected by the Ninth Circuit. (See cases cited *infra,* pp. 10-12.)

The Ninth Circuit's refusal to consider the defense of voluntariness is also an explicit rejection of other branches of preemption analysis established by this Court. *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965); *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72 (1982); *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983); and *Ass'n. of Machinists v. Gonzales,* 356 U.S. 617 (1958).

Stranger yet is the Ninth Circuit's conclusion that the Union's conduct in misleading its members did not constitute fraud, whether negligent or intentional, sufficient to vitiate the consent given. The Ninth Circuit's finding that a fiduciary may profit from its deceit is contrary to California statutory and case law as well as to numerous decisions issued by every Circuit Court of Appeal in delineating the duty of fair representation owed union members.

B. Jurisdiction Under Section 301 Of The LMRA Overlaps The Jurisdiction Of The NLRB.

In finding that the issue of voluntariness resides within the primary jurisdiction of the NLRB, the Ninth Circuit miscomprehends the scope of that doctrine as well as the jurisdictional reach of Section 301. The doctrine of primary jurisdiction has no applicability where (1) the administrative processes are irrelevant to the legal issues raised; (2) the issue is within the usual competence of the judiciary; and (3) the NLRB would not have jurisdiction to hear the dispute in which the issue arises. *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co., supra,* at pp. 686-687.

All three factors are present here. Like the antitrust claim at issue in *Jewel Tea,* a complaint to collect a union-imposed fine is outside of the NLRB's jurisdiction. *NLRB v. Boeing Co., supra.* Nor would the NLRB's focus be identical. The NLRB is only interested in the union's actions vis-a-vis union members *where* such actions implicate *the employment relationship. Miranda Fuel Co.,* 140 NLRB 181 (1962), *enf. den. on other grounds,* 326 F.2d 172 (2nd Cir. 1963); and *Utility Workers Union of America,*

Local 223, Case No. 7-CB-6295, 119 LRRM 1309 (Div. of Advice, 1985). The NLRB "has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *Belknap v. Hale, supra*, quoting *J. I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944). In contrast, the District Court's inquiry was directed to a contractual issue, to wit, whether Vevoda, Chamness, and Sottana *knowingly* consented to become union members - an issue necessarily encompassed in a contract action. The legality of the Union's conduct under the LMRA is irrelevant to this determination.[4]

The primary jurisdiction doctrine has no applicability for a much more fundamental reason. The District Court's jurisdiction was premised on Section 301 of the LMRA. This Court has long held that federal courts have jurisdiction under Section 301 to decide issues over which the NLRB has concurrent jurisdiction. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); and *Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16 (1974) (". . . the *Garmon* [preemption] doctrine is 'not relevant' to actions within the purview of § 301."). Simply stated, "the authority of the Board to deal with an unfair labor practice which also violates a . . . contract . . . is not exclusive . . ." 371 U.S. at 197.

Specifically, this Court has found jurisdiction over actions against unions for breach of the duty of fair repre-

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[4] A slightly different set of facts is illustrative of the distinction. Unquestionably, it is an unfair labor practice for a union to fine or to sue to collect a fine imposed on a member who has resigned. *NLRB v. Textile Workers*, 409 U.S. 213 (1972). Yet if sued, could not the ex-member defend against the complaint by asserting the lack of a contract? The focus of the defense is the contractual issue raised and not the legality of the union's conduct. The Ninth Circuit's analysis would bar such a defense.

sentation though *such claims are also cognizable by the NLRB. Vaca v. Sipes, supra.* The Ninth Circuit did not consider nor discuss *Vaca* though it, along with other Courts of Appeal, has held that a union member need not allege a breach of a collective bargaining agreement in order to bring an action for breach of the duty of fair representation. *Retana v. Elevator Operators Union,* 453 F.2d 1018, 1022 (9th Cir. 1972) (and see cases cited therein). Though the circuit courts often premise jurisdiction on Section 1337 of the Judicial Code (28 U.S.C. § 1337), in *Lockridge* this Court read *Vaca* as extending federal subject matter jurisdiction "even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement." *Supra,* at 299.

Without doubt, if Vevoda, Chamness and Sottana had used Section 301 as a sword asserting that the Union's misrepresentations were an actionable breach of the Union's fiduciary obligation, the District Court would have had jurisdiction under either Section 301 or 28 U.S.C. § 1337.[5] Yet, the Ninth Circuit refuses to permit the converse defense to be raised as a shield to the Union's sword. The difference goes unexplained.

The Ninth Circuit's decision is also in direct conflict with decisions issued by its sister circuits. In *Marden v. IAM,* 576 F.2d 576 (1978), the Fifth Circuit entertained the *identical* issue raised by a *plaintiff* in a case arising under the Railway Labor Act (45 U.S.C. § 151, *et seq.*).

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[5] In point of fact, Sottana, in his answer, filed such a counterclaim. Subsequently, it was voluntarily dismissed.

> "Appellant contends that, via the Notice of Union Membership Requirement, he was essentially hoodwinked into joining the Machinists even though the most that could be lawfully required was the payment of fees incidental to membership. Moreover, according to Marden, even this monetary requirement was inoperative in the present case. Since the collective bargaining agreement between the IAM and NAL went too far by requiring membership rather than just money, it was illegal, hence ineffective to impose union obligations of any sort. Therefore, Marden owed neither his dollars nor his name to the Union and gave them only because he was misinformed about his obligations by the Notice of Union Membership Requirement. Now aware of his rights, Marden wants his money back." (Footnote omitted.) 576 F.2d at 578-579.

Most recently, in *Beck v. Communication Workers*, — F.2d — , 120 LRRM 2957 (4th Cir. 1985), twenty "dues-paying members" brought suit claiming that their union representative had unlawfully exacted dues money under an agency shop provision. As in this case, the union asserted that the issue was solely within the NLRB's jurisdiction. In rejecting the argument found controlling by the Ninth Circuit, the Fourth Circuit stated:

> "As their final thrust at the statutory claim of plaintiffs, defendants assert that plaintiffs' action, if sustainable, is within the jurisdiction of the National Labor Relations Board and that plaintiffs are without any justiciable remedy for the redress of this violation of their rights. Defendants conceded in their affidavits and motions, however, that a portion of the dues collected from plaintiffs by them was and will be used to finance political activities. The conscious use of such funds by the unions on their authority as the exclusive bargaining representative under the agency contract negotiated by them with the employer

is not only a violation of the statute itself but also a violation of the defendants' duty of fair representation. In either case, the action would have been within the jurisdiction of the district court under 28 U.S.C. § 1337." (Emphasis added.) 120 LRRM at 2969.

In fact, the Ninth Circuit stands alone in refusing to consider an issue or claim which alleges a breach of the duty of fair representation (in the absence of an accompanying breach of a collective bargaining agreement) that is, as well, an arguably unfair labor practice.[6] *Lewis v. Laborers Local 100,* 750 F.2d 1368, 1376-1377 (7th Cir. 1984); *Quinn v. DiGiulian,* 739 F.2d 637, 638 (D.C. Cir. 1984); and *Magallanes v. Local 300, Laborers,* 40 Cal. App.3d 809, 817 (1974); *but see Distler v. United Mine Workers,* 711 F.2d 76, 79 (7th Cir. 1983). This refusal is plainly inconsistent with the text of *Lockridge,* above quoted. 403 U.S. at 299.

The Ninth Circuit's decision is more than a little baffling. It conflicts with well-settled precedent establishing federal jurisdiction. Unless Section 301 jurisdiction is to be given two meanings—one when a collective bargaining agreement is at issue and another for union constitutions—the Ninth Circuit's decision cannot be left to stand.

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[6] It may well be that the Ninth Circuit previously exercised jurisdiction over such claims and has now, *sub silentio,* reversed itself. In *Seay v. McDonnell-Douglas Corp.,* 427 F.2d 996 (1970), the Ninth Circuit considered a claim similar to that present in *Beck,* refusing to find it within the NLRB's primary jurisdiction. *See also Beriault v. Warehousemen's Union,* 501 F.2d 258 (9th Cir. 1974).

C. By Refusing To Entertain The Defense Of Illegality, The Ninth Circuit Has Placed Itself In Conflict With Both Controlling Precedent Of This Court And Of The First Circuit.

As an alternative basis for entertaining the defense proffered, the District Court found instructive *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), which held that under Section 301 any dispute as to a contract's legality must be considered, even where the issue is arguably within the NLRB's jurisdiction. The Ninth Circuit, along with the Tenth Circuit (*Mo-Kan Teamsters Pension Fund v. Creason*, 716 F.2d 772 (1983)), has given *Mullins* an unduly restrictive reading. Both circuits limit *Mullins* to attacks on specific contractual provisions. (*Infra*, p. A6; and 716 F.2d at 775.) The contract itself is immune from attack. *Id.*

In contrast, the First Circuit has correctly held that the *express wording* of *Mullins* is to the contrary. (" . . . [A] federal court has a duty to determine whether a contract violates federal law before enforcing it.", 455 U.S. at 83.) In *Courier-Citizen Co. v. Graphic Arts Local 11*, 702 F.2d 273, n. 6 (1983), the First Circuit read *Mullins* as requiring it to consider any attack on the legality of the contract. *See also ILGWU, Local 145 v. Fashion Associates*, 596 F.Supp. 77, 79 (D.N.J. 1984) (employer asserts lack of contract based on its withdrawal from multi-employer unit).

The First Circuit distinguished between providing affirmative relief, as solely within the NLRB's power, and complying with this Court's command in *Mullins* that Section 301 not be used as a mechanism for enforcing an illegal

contract. Both the First Circuit and the District Court in this case correctly noted that this distinction underlies the reasoning of *Mullins* (455 U.S. at 86). Thus, the District Court concluded that "this distinction is crucial because, where a defendant seeks no affirmative relief . . . there is no danger of a conflict in remedy between the court's ruling on the contract claim and a possible ruling of the NLRB . . ." (*Infra*, p. B5.)

If there were any doubt that *Mullins* must be given this interpretation, it was put to rest in *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983), where a unanimous court unequivocally stated that *contracts* contrary to public policy cannot be judicially enforced. The national policy of voluntary unionism is not only set forth in numerous decisions of this Court but is expressly codified in the LMRA (29 U.S.C. §§ 157, 158(b)(1)(A)) and was reaffirmed as late as last term in *Pattern Makers League of No. America v. NLRB*, *supra*.

The Ninth Circuit's refusal to entertain this defense carves out an exception inconsistent with *Mullins* and *W. R. Grace* and rejected by the First Circuit Court of Appeals. The proposition that an illegal contract can be judicially enforced while a contract provision cannot is absurd. It requires reversal.

D. Federal Courts Have Jurisdiction To Adjudicate Purely Internal Union Matters.

Well before the blossoming of current preemption analysis, this Court established the principle that state courts are free to adjudicate purely internal union disputes. In *Ass'n of Machinists v. Gonzales*, 356 U.S. 617

(1958), a union member was permitted to sue his union for wrongful expulsion.

> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages.
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> * * *
>
> . . . [T]he subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b) (2)." 356 U.S. at 621-22.

Though the reach of *Gonzales* has been limited, this Court has expressly refused to overrule it. *Plumbers v. Borden*, 373 U.S. 690, 697 (1963); and *Motor Coach Employees v. Lockridge, supra*, at 294-295. Rather, the Court has restricted *Gonzales* to cases where the complaint focuses *solely* on internal union matters. *Id.* Thus, *Gonzales* was inapplicable in *Lockridge, supra* at 295-296, because the crux of the action concerned the union's interference with the plaintiff's employment relationship by procuring his discharge under a union security clause, and in *Borden, supra* at 697, because the complaint focused on the plaintiff's employment as affected by the practices of the union in operating its hiring hall.

The employment relationship between Lucky Stores and Chamness, Vevoda and Sottana is not directly implicated by the proffered defense. Unlike *Lockridge*, the District Court was not required, nor did it, interpret the

union security clause in effect between Lucky Stores and Local 302. Unlike *Lockridge*, there is no claim here that Local 302 was illegally enforcing its union security clause. Rather, *irrespective of any union security clause*, Chamness, Vevoda and Sottana contended that the statements and actions of Local 302 were fraudulent under California and/or federal law. As in *Gonzales*, the focus is on the Union's contractual relationship with its members. The District Court's decision does not, nor does it attempt to, regulate the Union's conduct vis-a-vis Lucky Stores.

Moreover, by its own terms, *Lockridge* supports the District Court's jurisdiction. The *Lockridge* court went to great lengths to stress the absence of a Section 301 claim against the Union for breach of the duty of fair representation. 403 U.S. at 299. Had such a claim been present, *federal* jurisdiction existed. *Id.; see generally Beck v. Communication Workers, supra*, 120 LRRM at 2969-2970. Thus, Vevoda, Chamness and Sottana's claimed defense falls squarely within the jurisdictional ambit of *Lockridge*.

The Ninth Circuit's decision has the effect of (1) overruling *Gonzales*, despite this Court's refusal to do so, and (2) broadening the applicability of *Lockridge* to exclude Section 301 claims. The Ninth Circuit returns to the NLRB, at least in part, a class of cases which the NLRB has, with the approval of this Court, consistently refused. *NLRB v. Boeing Co., supra* at 74-75. Nor, for a variety of reasons, will the NLRB necessarily agree to accept this grant of jurisdiction. *See Jewel Tea, supra* at 687; and *Vaca supra* at 182-183. Though the Union has imposed fines totalling over $13,000.00, the Ninth Circuit

bars judicial inquiry into the most critical of all internal union matters — the voluntary undertaking of the obligations of membership.

E. The Ninth Circuit Sanctions The Right Of A Union To Lie To Its Members And Enforce The Contract That Results In Direct Conflict With California And Federal Law.

The record evidence was uncontroverted that Local 302 told Chamness, Vevoda and Sottana that they were required to sign a membership application and take a membership oath. (*Infra*, p. B2.) The record was uncontroverted that as a result of the Union's statements, each believed that they were required to become and remain full-fledged members, subject to union discipline. *Id.* The record was uncontroverted that Local 302 never told Chamness, Vevoda or Sottana the truth, nor advised them that they had a right to resign their membership in the Union. *Id.*

Nonetheless, the Ninth Circuit ruled that the consent given was freely given and that, implicitly, Chamness, Vevoda and Sottana *knowingly* became union members. (*Infra*, p. A7.) Lacking case law authority for this bizarre result, the Court reasons that it would have been "unreasonable" for union agents to know that full union membership could not be required since it was not until 1979 that the Ninth "Circuit decided that a union could not require full-fledged union membership. . ." (*Infra*, p. A7.) The justification for fraud is both factually and legally wrong, and again, contrary to precedent.

As early as 1953 this Court established the proposition that full-fledged union membership could not be compelled, *Radio Officers Union v. Labor Board,* 347 U.S. 17, 41 (1953), and reaffirmed it in 1964 in *NLRB v. General Motors Corp., supra.* Indeed, the Ninth Circuit held as much in *NLRB v. Hershey Foods Corp.,* 513 F.2d 1083, in April 1975, four years before it now says it did and well before the relevant events in this case. Quite simply, the Ninth Circuit is wrong when it states that the chief executive officer of Local 302 was legally justified in misleading Chamness, Vevoda and Sottana. Absent this "justification", there can be no doubt but that under either California or federal law, a fiduciary is not privileged to engage in such deceit.[7]

Under California law, the consent necessary for the formation of a contract must be free, or the contract may be rescinded. (California Civil Code §§ 1565, 1566.) "Apparent" consent is not free when obtained through fraud or mistake. (California Civil Code § 1567.)

California defines both the fraud or mistake necessary to vitiate consent. (California Civil Code §§ 1572, 1573, 1577, 1578.) For instance, constructive fraud is defined as "any breach of duty which, *without an actually fraudulent intent,* gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him. . ."

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[7] The Court expressly left open the issue of what substantive law—state or federal—is to be applied in § 301(a) cases involving union constitutions. *Plumbers v. Plumbers Local 334, supra,* 452 U.S. at 627. The Ninth Circuit's perfunctory analysis did not address the issue. *(Infra,* p. A7.) Hence, both California and federal law will be reviewed.

(California Civil Code § 1573(1), emphasis added.) A mistake of law is defined, in part, as "a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law. . ." (California Civil Code § 1578(1).)

Contrary to the Ninth Circuit's belief, no element of intentionality is required.[8] It matters not whether consent is obtained through intentional misrepresentation, negligent misrepresentation, or innocent misrepresentation. In all cases, under California law, the consent is fraudulently obtained and voids the contract. *Guthrie v. Times-Mirror Co.*, 51 Cal.App.3d 879, 890 (1975); *Wood v. Kalbaugh*, 39 Cal.App.3d 926, 929 (1974); and *see generally*, "Restatement of Contracts," § 476, Comment b.

Where, as here, the misrepresentations are made by a fiduciary, the standard is stricter. California law goes so far as to *presume* the inherent unfairness of any advantage obtained by a fiduciary agent. *Boyd v. Bevilacqua*, 247 Cal.App.2d 272, 290-91 (1966) and *Platt v. Wells Fargo Bank*, 222 Cal.App.2d 658, 667 (1963), *cert. den.* 377 U.S. 965 (1964). The burden is on the fiduciary agent to demonstrate that the contract was entered into by the principal (1) voluntarily, (2) with full knowledge of all of the facts, and (3) with a *perfect* understanding of the effect of the transaction. *Webb v. Saunders*, 89 Cal.App.2d 732, 735-36 (1949). Quite obviously, the Union could not carry

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[8] As a factual matter, there was no record evidence of the Union's motives at the time the statements were made. As noted, the Union filed no counter-declarations. The Ninth Circuit's findings, if that is what they are, are pure speculation.

this burden on this record. Yet the Ninth Circuit blithely dismisses California law as unsupportive.[9]

Even if California law were not applicable, federal law imposes the identical fiduciary obligation. *Vaca v. Sipes, supra,* at 177; *Humphrey v. Moore,* 375 U.S. 335, 448 (1964); and *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953) (union power "subject always to complete good faith and honesty of purpose."). Indeed, every Circuit Court of Appeal that has addressed the issue has held that a union may not mislead the employees it represents. *E.g., Teamsters Local 860 v. NLRB,* 652 F.2d 1022 (D.C. Cir. 1981). This fundamental obligation has its greatest import when a union security clause is involved. In such cases, the union has an *affirmative* duty to advise an employee as to his contractual obligations. *Robesky v. Qantas Empire Airways, Ltd.,* 573 F.2d 1082, n. 17 (9th Cir. 1978).

In both *Boosters Lodge No. 405 v. NLRB,* 412 U.S. 84, 88 (1973), and *NLRB v. Granite State Joint Board,* 409 U.S. 213, 217 (1972), this Court would not allow a union to enforce restrictions on the right to resign, contained in the union's constitution, absent actual notice to the affected members. *See generally Auto Workers, Local 1384,* 227 NLRB 1045, n. 21 (1977). Any ambiguity in the notice is a burden borne by the union as a result of its fiduciary obligation. *Cf. H. C. Macaulay Foundry Co. v. NLRB,* 553 F.2d 1198, 1201 (9th Cir. 1977).

The requirement of affirmative notice is consistent with numerous decisions issued by this Court holding that

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[9] This exact defense was sustained by a California Municipal Court under nearly identical facts. *Retail Clerks Union Local 17 v. Meilan,* Case No. C11525 (May 12, 1981), included hereto in Appendix "D".

the waiver of a statutory right must be clearly and unequivocally expressed. *E.g., Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 103 S.Ct. 1467, 1476 (1983). Becoming a union member is, of course, probably the most important statutory waiver that an employee can make, to wit, the right to refrain from union activity. 29 U.S.C. § 157. Yet, the Ninth Circuit allows Chamness, Vevoda, and Sottana to waive their Section 7 rights, not based on knowledge, but on union deceit.

In any other context, the conduct sanctioned by the Ninth Circuit would be found to be impermissible and would vitiate contractual consent. *E.g., Passaic National Bank v. Commercial National Bank,* 262 F. 234 (D.C. Cir. 1919); *see also SEC v. Blavin,* 760 F.2d 706, 711-712 (6th Cir. 1985) and *U.S. v. Dial,* 757 F.2d 163, 168 (7th Cir. 1985). It is inconceivable that a fiduciary could enter into a contract based on its own misrepresentations, whether intentional or not, and then benefit to the tune of over $13,000.00. A union "may not advance its self-interest at the expense of the union members to whom its fiduciary responsibility runs." *Ballas v. McKieran,* 35 N.Y.2d 14, *cert. den.* 419 U.S. 1034 (1974).

The Ninth Circuit's decision undercuts the rights of union members throughout this country to exercise, *freely and knowingly,* the rights guaranteed them by Section 7 of the LMRA. A little less than twenty years ago, in dissent, Justice Black noted that "[f]ew employees forced to become 'members' of the union by virtue of the union security clause will be aware of the fact that they must somehow 'limit' their membership to avoid the union's court-enforced fines. . ." *NLRB v. Allis-Chalmers, supra,* at

215. Justice Black's words are all the more prophetic where a union negotiates, as it did here, a union security clause that seemingly compels union membership and then is permitted to administer that clause in a deceitful manner. *See generally* Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022 (1976). If a union may freely deceive employees into becoming members, Justice Black's "few' will become none, and the concept of voluntary unionism embedded in this nation's labor laws will be all but meaningless.

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CONCLUSION

The Ninth Circuit's decision stands in defiance of established federal law. The effective result is to dichotomize Section 301 and impair the right of union members to freely decide whether to undertake the obligations of membership. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

December 23, 1985.

Respectfully submitted,

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian
Counsel of Record

Attorneys for Petitioners

APPENDIX "A"

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2282

D.C. #CV-82-5861-AJZ

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Plaintiff-Appellant,

v.

CRAIG VEVODA, KENNETH CHAMNESS and MARK SOTTANA,

Defendants-Appellees.

OPINION

(Filed September 24, 1985)

Appeal from the United States District Court
for the Northern District of California
Alfonso J. Zirpoli, District Judge, Presiding
Argued and submitted April 12, 1985, in
San Francisco, California

Before: SCHROEDER, NELSON, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

This is an action by a union to collect fines levied against three of its members who violated the union's by-laws by working behind a picket line during a strike. The district court had jurisdiction pursuant to section 301 of the National Labor Relations Act (NLRA), 29 U.S.C. § 185.

The district court granted summary judgment for the defendants. It held that although the defendants had joined the union and had accepted all the burdens and benefits of membership until the time that they crossed the picket lines, they were nevertheless not bound by the contractual provisions applicable to union embers. Defendants argued they had been fraudulently induced to join the union. They were told that, pursuant to a valid union security provision in the collective bargaining agreement, they had to become union members as a condition of employment, and they were not told that under recent case law, the membership requirements could be satisfied by merely paying dues. The district court concluded that they had not "knowingly or voluntarily" become members of the union. *Milk Drivers & Dairy Employees Union v. Vevoda*, 587 F. Supp. 483, 484 (N.D. Cal. 1984). We reverse.

The facts are straightforward. The plaintiff, Local 302, is a labor organization which at all times relevant to this action was party to a collective bargaining agreement with Lucky Stores, Inc., covering the San Francisco Bay Area. The contract between the union and Lucky Stores contained a security clause which required employees of Lucky Stores to become union members within thirty days of commencing employment.[1] The union bylaws, applicable to each member of the union, provide that, in the event of a strike, the union may fine members who continue to work.[2]

Defendants Vevoda and Sottana became employees of Lucky Stores in 1976 and joined the union shortly thereafter. Defendant Chamness had joined the union in 1956, and transferred to the plaintiff Local in 1975 when he

became an employee of Lucky Stores. According to the uncontroverted affidavits of defendants Vevoda and Sottana, a representative of the employer told each of them, soon after they were employed, that they had to go to the Teamsters Local "to fulfill certain contractual obligations" as a condition of continued employment. The affidavits further state that when Vevoda and Sottana arrived at the Local, a receptionist told them to fill out certain forms which defendants believe included a "membership application" form, and to attend an orientation meeting. At the orientation meeting, an officer of Local 302 told them they were required to take a membership oath.

Defendant Chamness joined a different local in 1956 and later transferred to Local 302. This affidavit contains parallel statements regarding his experiences with his first employer and local. However, the record does not show that any representative or employee of Local 302 made any statements whatsoever to Chamness about union membership.

All three defendants stated that they had never been told by any union representative that they could retain employment by merely paying dues and other fees. Further, they have all stated that if they had known that they did not have to become full-fledged union members, they would not have become members of Local 302. However, none of the defendants has alleged that the union ever threatened to fire him if he did not become a full-fledged member.

In 1978, the union authorized a strike against Lucky Stores and advised all of its members to honor the picket lines. Some days after the strike began, these appellees

crossed the picket lines in order to work. The union levied the fines at issue here, which were upheld through a course of internal union appeals. When the defendants refused to pay, the union filed this action. For purposes of this appeal, there is no dispute that the defendants had joined the Local and were regarded as members in good standing until the time the fines at issue were levied, that they at no time questioned the terms of their membership, and that they never sought to resign full-fledged membership.

Defendants contend that they are not contractually bound to membership in the Local. This defense is based on the construction of section 8(a)(3) and 8(b)(2) of the NLRA, 29 U.S.C. §§ 158(a)(3), (b)(2) by both the National Labor Relations Board (NLRB), and the courts reviewing NLRB decisions. Those provisions relate to labor agreements requiring union membership as a condition of employment. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S. Ct. 1453, 10 L.Ed.2d 670 (1963); *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980 (9th Cir. 1979); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975). Defendants place particular reliance upon our decision in *United Stanford Employees*, 601 F.2d at 982-83, holding that a union, under a security agreement similar to that here, cannot force a dues-paying member of the bargaining unit to become a full-fledged member of the union. They also rely upon *Hershey Foods Corp.*, 513 F.2d at 1085-87, where we held that unfair labor practices had been committed in connection with attempts to fire employees who offered to pay dues but refused to become full-fledged members of the union.

Consideration of the defense in this case requires the district court to evaluate a union's dealings with employees

about union membership. This is conduct closely regulated by sections 7 and 8 of the NLRA. A defense requiring judicial scrutiny of such activity is normally considered to be outside the jurisdiction of the district courts in section 301 contract actions and within the exclusive jurisdiction of the NLRB in the context of unfair labor practice disputes. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959); *Gardner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L.Ed. 228 (1953); *Beriault v. Local 40, Super Cargoes & Checkers of I.L.&W.U.*, 501 F.2d 258 (9th Cir. 1974).

This doctrine, which is known as the doctrine of primary jurisdiction, recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the NLRB. *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1342 (9th Cir. 1982). The Supreme Court has stated: "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA]' . . . ." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83, 102 S. Ct. 851, 859, 70 L.Ed.2d 833 (1982) (quoting *Garmon*, 359 U.S. at 245, 79 S. Ct. at 780, 3 L.Ed.2d 775). Application of the doctrine of primary jurisdiction in this case would require reversal because the district court lacked jurisdiction to consider the defense proffered by the defendants.

The defendants argue, and the district court agreed, that this defense falls within the exception to the doctrine of primary jurisdiction recognized by the Supreme Court in *Mullins*, 455 U.S. 72, 102 S.Ct. 851, 70 L.Ed.2d 833. There, the Court acknowledged that conduct committed

to the NLRB's jurisdiction pursuant to section 8 of the Act normally comes within the NLRB's exclusive jurisdiction. It held, however, that a court in a section 301 action could decide whether the particular clause in the contract which the plaintiff sought to enforce was invalid as violative of section 8(e) of the NLRA, 29 U.S.C. § 158(e) (the hot cargo clause). *Id.* at 83, 102 S. Ct. at 859, 70 L.Ed.2d 833. Defendants argue that *Mullins* created a broad exception for defenses in section 301 actions based upon conduct which arguably violates the NLRA.

We considered, and rejected, a similar argument in *Glaziers & Glassworkers Local Union No. 767,* 689 F.2d 1339. In *Glaziers* we held that the NLRB's primary jurisdiction over the maintenance of contractual relationships between employers and unions preempted the district court from adjudicating a defense of invalidity of a collective bargaining agreement. *Id.* at 1342-45. We distinguished *Mullins* because the dispute there involved the interpretation of a term of the collective bargaining agreement, and not a defense that the parties had never entered into a binding contract. *Id.* at 1343-44. In *Glaziers,* as here, the defense is not the illegality of any contractual provision, but an attempt to "avoid the entire agreement." *Id.* at 1343. As we stated in *Glaziers,* "[t]his is quite distinct from the situation in *Mullins,* where the Court heid that the district court could properly interpret a provision of a contract to determine if it was void under section 8(e) of the NLRA." *Id.* at 1343-44. Our decision in *Glaziers,* and the authorities on which it is based, requires a reversal of the district court's decision in this case.

Even if we were to agree with the defendants, however, that the subject of their fraud defense is a matter of

particular local concern and is not preempted by the primary jurisdiction of the Board, *see Belknap, Inc. v. Hale*, 463 U.S. 491, —, 103 S. Ct. 3172, 3177, 77 L.Ed.2d 798 (1983), we would have to reverse the district court. The record does not factually support the assertions, repeated throughout appellees' brief on appeal, that officials of Local 302 "lied" to the defendants or "actively misled" them into joining the union. Their affidavits recite that a receptionist handed Vevoda and Sottana membership forms and an officer administered the oath required for membership in the Local. No representative of the union ever told any of the defendants that they would be fired if they resigned from full-fledged union membership and merely paid dues. It does not appear that anyone, plaintiff or defendants, ever thought of such a possibility during the period in question. Undoubtedly the defendants were under the impression that they had to become union members, since the collective bargaining agreement so stated. But there is no suggestion that any union representatives had any knowledge of the gloss which the NLRB and the courts have superimposed upon the statutes authorizing such clauses. Indeed it would have been unreasonable to expect the union agents to have any such knowledge in this case. It was not until 1979, the year after the strike occurred (though several years before these defendants asserted their defense), that this circuit decided that a union could not require full-fledged union membership under union security agreements similar to that under which these defendants were working. *United Stanford Employees*, 601 F.2d 980.

Whether we are to apply principles of federal labor law or California fraud law, our result here would not differ.

The judgment of the district court is reversed and the matter remanded for further proceedings.

FOOTNOTES

[1] The security clause reads:

> Union Membership. Membership in the Local Union on or after the thirtieth day following the beginning of employment or the effective date of this Agreement, whichever is later, shall be a condition of employment. Upon written notice from the local Union of failure on the part of any individual to complete or maintain membership in the Local Union as above required or a failure to tender payment to the Local Union, the Employer shall, within seven (7) days of such notice, discharge said employee.

[2] The applicable union bylaws reads:

> In the event of any firm being struck or being declared unfair by the Union and a boycott is placed against such firm, any member of the Union failing to come out on strike when so requested by authorized officials of the Union shall be fined not less than One Hundred Dollars ($100.00) or expelled. . . .

In addition, the Constitution of the International Brotherhood of Teamsters, which applies to all members of local affiliates, prohibits the "crossing [of] an authorized picket line established by the member's Local Union or any other subordinate body affiliated with the International Union."

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-5861 AJZ

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302, et al.,

Plaintiffs,

vs.

CRAIG VEVODA, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed June 29,1984)

Defendants Craig Vevoda, Kenneth Chamness, and Mark Sottana move for summary judgment in this contract action brought to enforce fines which were imposed by the union as discipline for their having worked behind Teamster picket lines during a 1978 strike against Lucky Stores, defendants' employer. The contract upon which this suit is based is that created by virtue of defendants' union membership. *See Harris v. National Union*, 98 Cal.App.2d 733 (1950). Defendants have each filed affidavits, which the union has not controverted in any way, in support of their position that they did not voluntarily become and remain full-fledged members of the union and so may not be fined in accordance with the union constitution and bylaws governing internal discipline.

Defendants' uncontroverted affidavits establish that they were told by union representatives that they "had to" fill out membership applications and "were required to take an oath of membership" if they wished to continue working for Lucky Stores, since the applicable collective bargaining agreement contained a provision stating that "[m]embership in the local union on or after the 30th day following the beginning of employment . . . shall be a condition of employment." Defendants have stated in their declarations that they believed they were required to maintain full membership in the union as a condition of employment, and that they would have resigned from the union if they had known of their right to do so without losing their jobs (so long as they continued to pay union dues). *See NLRB v. Hershey Food Corp.*, 513 F.2d 1083, 1086-87 (9th Cir. 1975). Thus, these defendants have made an uncontroverted showing that they were misled by express statements of union personnel into believing that they were required to become full members of the union in order to retain their jobs, and that they remained union members from the time that they first joined and throughout the strike only because they never learned of their right to resign from the union without forfeiting their jobs. This showing is sufficient to demonstrate that defendants did not knowingly and willingly subject themselves to the union's internal disciplinary provisions and procedures, thus precluding enforcement of the contract against them. The affirmative acts of union representatives in misinforming defendants that they were required to submit membership applications and to take the membership oath vitiated defendants' consent to enter into the contract which the union now seeks to enforce against them.

The fact that these defendants had been union members for a substantial period of time does not, by itself, ameliorate the effect of those initial misrepresentations. Nor is there any indication that these defendants ever had any reason to know, until after the fines were imposed, of their right to withdraw from the union (but to continue to pay union dues) and still retain their jobs.

The union argues that the issue of whether these defendants voluntarily became or remained full union members subject to union discipline is one which lies within the exclusive jurisdiction of the NLRB, and therefore, the court may not consider this defense. The court disagrees. While it is true that the NLRB would have jurisdiction to decide whether it was an unfair labor practice for the union to mislead defendants into becoming and remaining full members of the union and to seek to enforce these fines,[1] the court is not precluded from considering this defense where the controversy is not "identical" with that which could be presented to the NLRB. *Belknap, Inc. v. Hale*, — U.S. —, 51 U.S.L.W. 5079, 5084 (June 30, 1983).

The question presented in this case is whether the fact that these defendants did not knowingly and willingly subject themselves to union discipline precludes the enforcement of the fines against them. This is *not* identical with the question of whether the union committed an unfair labor practice. While a decision upholding the defense asserted here may well have some impact upon union prac-

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[1] *See United Stanford Employees v. NLRB*, 601 F.2d 980 (9th Cir. 1979); *Pattern Makers' League, etc. v. NLRB*, 724 F.2d 57 (7th Cir. 1983); *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984).

tices, since it restricts a union's ability to enforce fines in certain circumstances, it does not *compel* the union to change its practices, as would be the case if the NLRB were to rule that the misrepresentations and non-disclosure that occurred in this case constituted an unfair labor practice. The resolution of this case turns upon the law of contract, not upon an interpretation of the National Labor Relations Act. Thus, the matter to be decided by this court is not identical with that which could have been presented to the NLRB, and so it does not lie within the exclusive jurisdiction of that body.

Nor is the defense asserted here preempted by the substantive provisions or policies of the federal labor law. Where there is no conflict with federal labor policy, and the controversy presented to the court is not identical with that which could be presented to the NLRB, principles which are deeply rooted in local law (such as that a contract cannot be enforced unless entered into knowingly and willingly) are not preempted. *Belknap,* — U.S. —, 51 U.S.L.W. at 5081, 5084-85. No danger of any conflict with federal labor policy is presented by entertaining the defense asserted here. It is established law that full-fledged union membership cannot be required as a condition of employment. *See Hershey Foods,* 513 F.2d at 1086-87. Whether or not the actions of the union in this case constitute an unfair labor practice, it is certainly not part of the federal labor policy to actively *prevent* the disclosure of legal rights to present and future union members. A ruling that the defense asserted here is valid under state law poses no danger of *conflict* with any ruling of the NLRB or policy of the federal labor law.

The union, relying on *Motor Coach Employees, etc. v. Lockridge,* 403 U.S. 274 (1971), argues that even if the

substance of the defense asserted in this action is in accordance with federal labor law, court jurisdiction is still preempted. The purpose of the preemption doctrine, as *Lockridge* makes clear, is to avoid conflicting *remedies*, as well as the conflicting application and interpretation of substantive rules of law. Thus, in that case, the Supreme Court noted that the avoidance of disparate remedies, even where the substantive rules are the same, may warrant a finding of preemption. 403 U.S. at 288-89 n.5. *Lockridge* is not on point, however, because it involved an action for affirmative relief (damages and reinstatement), whereas the present case involves only a defense to an action brought by the union. This distinction is crucial because, where a defendant seeks no affirmative relief, but rather merely claims that a union fine may not be enforced against him, there is no danger of a conflict in remedy between the court's ruling on the contract claim and a possible ruling of the NLRB on an unfair labor practice charge. Therefore, the admonition in *Lockridge* that the National Labor Relations Act "preempts state and federal court jurisdiction *to remedy* conduct that is arguably protected or prohibited by the Act,"[2] is not applicable to this case, in which no affirmative remedy is sought.

A case which the court finds instructive is *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), in which the Supreme Court held that the district court erred in refusing to entertain the defendant's illegality defense to an action to enforce a collective bargaining agreement even though the defense was based upon an allegation that the clause sought to be enforced was an unfair labor practice.

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2 403 U.S. at 276 (emphasis added).

Although recognizing the "general rule" that "federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' " the Court held that "[i]t is also well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S. at 83. Thus, "[w]hile only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA]." *Id.* at 86. While the union argues that *Mullins* should be limited to defenses based upon § 8(e) of the Act, this court declines to give it such a narrow application. Defendants in this case seek no affirmative relief, nor are they asking the court to decide whether the union committed an unfair labor practice. Rather, they merely seek to raise the deeply-rooted defense to an action on a contract that the execution of the contract was fraudulently induced. The recognition of this defense in no way conflicts with any provision or policy of the federal labor law. Under these circumstances, the defense sought to be raised is not preempted.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is granted.

Dated: June 29, 1984

/s/ Alfonso J. Zirpoli
United States District Judge

APPENDIX "C"

United States Code, Title 29, Section 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

United States Code, Title 29, Section 158(b)(1)(A)

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

United States Code, Title 29, Section 301(a)

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

United States Code, Title 28, Section 1337

Sec. 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

California Civil Code

§ 1565. Essentials of consent

ESSENTIALS OF CONSENT. The consent of the parties to a contract must be:

1. Free;
2. Mutual; and,
3. Communicated by each to the other.

§ 1566. Consent not free; rescission

CONSENT, WHEN VOIDABLE. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission.

§ 1567. Reality or freedom of consent; causes for defeating

APPARENT CONSENT, WHEN NOT FREE. An apparent consent is not real or free when obtained through:

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence; or,
5. Mistake.

§ 1572. Actual fraud

ACTUAL FRAUD, WHAT. Actual fraud, within the meaning of this Chapter, consists in any of the following

acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

§ 1573. Constructive fraud

CONSTRUCTIVE FRAUD. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

§ 1577. Mistake of fact

MISTAKE OF FACT. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

§ 1578. Mistake of law

MISTAKE OF LAW. Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

§ 1689. Grounds

* * *

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

APPENDIX "D"

IN THE MUNICIPAL COURT OF THE CHICO JUDICIAL DISTRICT

COUNTY OF BUTTE, STATE OF CALIFORNIA

CASE NO. C11525

RETAIL CLERKS UNION, LOCAL NO. 17,

Plaintiff,

vs

MICHAEL M. WOODS, et al.,

Defendants.

OPINION

(Filed May 12, 1981)

Union seeks to enforce fines imposed on local union members for having crossed a local union sanctioned picket line August, 1978. The fines consisted of actual wages earned by each defendant while working behind picket lines plus ¼th of the transcript costs of the local union's proceedings.

1. There is no question that a union has the power to discipline local union members.

2. The fine becomes a debt and is enforceable by local Courts.

3. Defendants claim that *if* they were not "full" members but merely "economic" members they would not be subject to discipline. This appears to be true since they would never have contracted

to be bound by the rules contained in the Union's Constitution and Bylaws.

4. What is the Union's obligation to advise employee-union eligible persons- of their choices between full membership and (for the lack of a better word) economic membership?

Exhibits Defendant A, B, C and D which are forms prepared by Plaintiff union state "The above employee has been advised of his obligation to become and remain a member of the Retail Clerk's Union within thirty-one (31) days from the date of his employment". Defendant's Exhibit G states in part, *"THE APPLICATION FOR MEMBERSHIP PROVIDED YOU MUST BE COMPLETED AND RETURNED TO THIS OFFICE WITHIN SEVEN DAYS"* . . . (Emphasis from document)

To add to this Mr. Loyd, Plaintiff's executive officer, stated Union membership was required and that *no one* told prospective members they could maintain employment if dues were paid. As near as this Court can determine one Crouch gave out "The notice to Union of new employees", and the "New member application Memo". It is unclear from the record where the actual obligation came from, how it was presented and with what language to a prospective member.

It, however, is rather clear the Union made the employer its agent to intimate that full membership was required, since the employer presented the document "Notice to Union of New Employee". Also the employer's obligation is outlined in Plaintiff's Exhibit 4, page 5, Sec. 111E (3) "-direct the new employee to report to the Union . . . and to be advised of the terms and provisions of this agree-

ment'' . . . Defendants were never referred to the Union in Chico.

The totality of the information provided new employees before membership is that *membership* is required or something will happen which has to do with the job. The Plaintiff's behavior in this case falls right in line with the behavior in United Stanford Employees and Stanford University. See Defendant's Supplemental Trial Brief.

5. Would defendants have joined the Union anyway? Meiland testified ''Not with the knowledge he has now!'' Nelson said ''he would not''. Feinblum said ''he never liked unions''. It appears to the Court that the defendants treated union membership as economic and did not consider themselves to be active participatory members.

6. The information provided prospective members was misleading and thus probably a prohibited labor practice. Where misleading information is given by a union to secure full membership the union should not then be able to reap the reward of that membership.

7. The Court does not find the trial proceeding inherently unfair, nor the amount of fines unreasonable.

8. The Court does not find that defendant Woods made a timely disaffirmance of the contract entered into during minority.

Judgment for defendant together with costs. Defendant's counsel to prepare judgment.

Date: 5-12-81

/s/ Ann H. Rutherford, Judge

Supreme Court, U.S.
FILED
JAN 23 1986
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No. 85-1098

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CRAIG VEVODA, KENNETH CHAMNESS and
MARK SOTTANA,
Petitioners,

VS.

MILK DRIVERS AND DAIRY EMPLOYEES
UNION, TEAMSTERS LOCAL 302,
Respondent.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BEESON, TAYER SILBERT
DUANE B. BEESON
Counsel of Record
100 Bush Street, Ste. 1500
San Francisco, Calif. 94104
Telephone: (415) 433-6330

Counsel for Respondent Milk Drivers and Dairy Employees Union, Teamsters Local 302

QUESTION PRESENTED

1. Whether the National Labor Relations Act prohibits enforcement by a union of its bylaws in an internal disciplinary proceeding against union members who acquired membership without having been informed by the union that they were entitled by law to avoid formal union membership under a union security agreement so long as they paid union dues and fees.

2. Whether the exclusivity of the jurisdiction of the National Labor Relations Board to determine questions of compulsory union membership arising under the unfair labor practice provisions of the National Labor Relations Act preempts the authority of a federal district court to resolve the merits of the issue presented in Question No. 1, stated above.

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Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The decision of the Court of Appeals is reported at 772 F.2d 530 (1985). The decision of the United States District Court for the Northern District of California is reported at 587 F. Supp. 483 (1984).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner has reprinted relevant provisions of the National Labor Relations Act, the Judicial Code and sections of the California Civil Code. In addition, Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, not cited by Petitioners, are also relevant to disposition of this case, and are reprinted as an Appendix to this Opposition.

STATEMENT OF THE CASE

A. The Nature of the Case and the Underlying Facts

This proceeding was instituted by Respondent, hereafter referred to as the Union, to collect fines which it had imposed on Petitioners, all of whom were Union members during the relevant period of time, following internal disciplinary proceedings against them. Petitioners were found by the Union's trial board to have violated the Union's Bylaws and the Constitution of the International organization with which the Union is affiliated by crossing and working behind picket lines during a strike. When Petitioners refused to pay the fines, complaint was filed in a municipal court of the State of California, but the case was thereafter removed by Petitioners to the United States District Court for the Northern District of California.

The case was disposed of by the District Court on Petitioners' motion for summary judgment, sustaining Petitioners' contention that the "contract" of membership between Petitioners and the Union, as expressed in its Bylaws, could not be enforced because Petitioners had not been advised when they became members that they were legally entitled to avoid formal membership under the

union security clause of the collective bargaining agreement which applied to them so long as they paid Union dues and fees.[1]

The circumstances under which Petitioners acquired membership in the Union have been accurately summarized in the decision of the court below as follows (Pet. App. A, pp.2-3):

> "Defendants Vevoda and Sottana became employees of Lucky Stores in 1976 and joined the union shortly thereafter. Defendant Chamness had joined the union in 1956, and transferred to the plaintiff Local in 1975 when he became an employee of Lucky Stores. According to the uncontroverted affidavits of defendants Vevoda and Sottana, a representative of the employer told each of them, soon after they were employed, that they had to go to the Teamsters Local 'to fulfill certain contractual obligations' as a condition of continued employment. The affidavits further state that when Vevoda and Sottana arrived at the Local, a receptionist told them to fill out certain forms which defendants believe included a 'membership application' form, and to attend an orientation meeting. At the orientation meeting, an officer of Local 302 told them they were required to take a membership oath.
>
> Defendant Chamness joined a different local in 1956 and later transferred to Local 302. This affidavit contains parallel statements regarding his experience with his first employer and local. However, the record does not show that any representative or employee of Local 302 made any statements whatsoever to Chamness about union membership.

---

[1] The contention sustained by the District Court was not the only defense which Petitioners interposed to the collection suit. Petitioners also argued that their motion for summary judgment should be granted because the Bylaw provision prohibiting members from crossing picket lines constituted an unenforceable contract of adhesion; that they were not afforded a fair trial in the disciplinary proceeding; that the Bylaw provision was in conflict with an implied no-strike clause in the collective bargaining agreement; and that Petitioners were performing supervisory work behind the picket line and were therefore immunized from discipline. The District Court did not consider these contentions in granting the motion for summary judgment, relying solely on the ground that Petitioners had been misled into believing that formal union membership was required of them in order to keep their jobs (Pet. App.B2).

> All three defendants stated that they had never been told by any union representative that they could retain employment by merely paying dues and other fees. Further, they have all stated that if they had known that they did not have to become full-fledged union members, they would not have become members of Local 302. However, none of the defendants has alleged that the Union ever threatened to fire him if he did not become a full-fledged member."

At all times relevant to this proceeding a union security provision was in effect between the Union and Lucky Stores which, in conventional phraseology required "membership in the Local Union" as a condition of employment following the statutory 30 day waiting period. (Pet. App. p.8,n.1)

B. The Decision of the District Court

The District Court in granting Petitioners' motion for summary judgment reasoned as follows: that the Union fines levied against Petitioners could be enforced only if their Union membership was voluntary; that their membership was actually the consequence of their wrongly held belief that formal Union membership was necessary to retain employment; that they would not have become or remained formal Union members had they been informed that such membership was not a condition of employment; and that the contractual obligations they had as Union members were the product of having been "misled by express statements of union personnel into believing that they were required to become full members of the union in order to retain their jobs" (Pet. App. A, p.2). In these circumstances, according to the District Court, the contract of membership, i.e., the Union Bylaws, could not be enforced against Petitioners because they had not been entered into "knowingly and willingly" (*ibid.*).

The District Court also rejected the Union's contention that the question of whether the Union had an affirmative obligation to

inform Petitioners that they could keep their jobs without becoming formal Union members is a matter which lies within the exclusive regulatory authority of the National Labor Relations Board, and thus is beyond the authority of the Court to adjudicate (Pet. App. B, pp.3-6). The Court concluded, to the contrary, that the question of whether union membership is voluntary is "deeply rooted in local law" and can properly be raised as a defense in a case such as this (*id.* p.4).

C. The Decision of the Court of Appeals

The court below considered both of the issues decided by the District Court, and rejected the District Court's analysis in each instance. With respect to the question of whether the District Court's authority had been preempted by the National Labor Relations Board, the court below pointed out that Petitioner's defense to the collection suit was premised on interpretative decisions of the Board and the Courts relating to the manner in which the National Labor Relations Act regulates "a union's dealings with employees about union membership" (Pet. App.A, pp. 4-5). Accordingly, the court below concluded that Petitioner's defense called for "judicial scrutiny" of "conduct regulated by sections 7 and 8 of the NLRB," and was therefore "within the exclusive jurisdiction of the NLRB in the context of unfair labor practice disputes" (*id.* p.5).

The Court of Appeals, however, did not rest its reversal of the District Court's decision on jurisdictional grounds alone. As explained in the decision below (Pet. App.A, pp.6-7):

> "Even if we were to agree with Petitioners, however, that the subject of their fraud defense is a matter of particular local concern and is not preempted by the primary jurisdiction of the Board, see *Belknap, Inc. v. Hale*, 463 U.S. 491, ___, 103 S. Ct. 3172, 3177, 77 L.Ed.2d 798 (1983), we would have to reverse the district court. The record does not factually support the assertions, repeated throughout appellees' brief on appeal,

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No. 85-1098

In The
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October Term, 1985

CRAIG VEVODA, KENNETH CHAMNESS AND MARK SOTTANA,
Petitioners,

vs.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,
Respondent.

PETITIONERS' REPLY BRIEF

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian
Counsel of Record
100 Pine Street, Suite 770
San Francisco, CA 94111
Telephone: (415) 433-6330

Counsel for Petitioners Craig Vevoda, Kenneth Chamness, and Mark Sottana

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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PETITIONERS' REPLY BRIEF

In opposition to the Petition for Writ of Certiorari (hereinafter "Petition"), Milk Drivers and Dairy Employees Union, Teamsters Local 302 (hereinafter "Local 302" or "Union") has attempted to characterize the issues presented for review as factual rather than legal. The Union's limited legal rebuttal is premised on a definition of the duty of fair representation uniformly rejected by every federal court. Moreover, since the filing of the Petition, the Eighth Circuit Court of Appeals in *Chavez v. United Food & Commercial Workers Union*, — F.2d —, 121 LRRM 2054 (1985), has joined its sister circuits in extending the duty of fair representation to a union's misrepresentations.

I

JUDICIAL JURISDICTION OVER CLAIMS FOR BREACH OF THE DUTY OF FAIR REPRESENTATION ENCOMPASSES THE DEFENSE INTERPOSED TO THE UNION'S CONTRACT ENFORCEMENT ACTION.

Local 302 does not dispute that federal courts have equal and concurrent jurisdiction with the National Labor Relations Board (NLRB) over claims for breach of the duty of fair representation. *Vaca v. Sipes*, 385 U.S. 171 (1967). In light of this admission, the Union's (as well as the Ninth Circiut's) conclusion that NLRB jurisdiction "preempts" the contract defense raised by petitioners is both irrelevant and incongruous. The question is not whether the defense involves conduct arguably subject to NLRB regulation, but rather, whether the district court's concurrent jurisdiction allows it to conclude that the Union's conduct violated the duty of fair representation owed petitioners thereby invalidating the contract in issue.

Local 302 attempts to confine the duty of fair representation to actions based "on the negotiation of a collective bargaining agreement . . . [or] the handling of a grievance which the Union controls by virtue of its status as [the employees'] exclusive representative." (Opposition, p. 11.) No federal court has ever found the duty of fair representation to be so circumscribed. In fact, this Court expressly held to the contrary in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299 (1971), a case which the Union does not even attempt to distinguish.

As set forth in the Petition (pp. 10-12), the lower federal courts have, until now, been unanimous in permitting employees to maintain actions for breach of the duty of fair representation even in the absence of an accompanying breach of a collective bargaining agreement. The Eighth Circuit has joined its sister circuits in sustaining such a claim. In *Chavez v. United Food & Commercial Workers Union, supra,* the court found a breach of the duty where a union induced employees to strike by falsely stating that striking employees would be unfair labor practice strikers and therefore not subject to permanent replacement.

Unquestionably, if the petitioners had sued Local 302 asserting that the Union misled them into believing they were required to become full members as a condition of continued employment, a federal court would have had jurisdiction to entertain the action under Section 301 of the LMRA. Th Ninth Circuit's contrary conclusion flies in the face of law established by this Court and applied by every other circuit court of appeals. In particular, it is directly contrary to the Fourth Circuit's decision in *Beck v. Communication Workers,* — F.2d —, 120 LRRM 2957

(1984). Local 302's meager effort to distinguish *Beck* on the basis that different facts were involved is a telling commentary on the applicability of the legal principles espoused in *Beck* to the facts present in this case.

The purpose of the preemption or primary jurisdiction doctrine is to divine the intent of Congress. *Fidelity Federal Savings & Loan Assn. v. De La Cuestra,* 458 U.S. 141, 152-153 (1982). Repeatedly this Court has noted Congress' reluctance to regulate the union-member relationship except in very limited circumstances. *NLRB v. Boeing Co.,* 412 U.S. 67 (1973); and *Vaca v. Sipes, supra.* To sustain the Ninth Circuit's refusal to consider an element critical to the establishment of an enforceable contractual relationship—the voluntary undertaking of the obligation—is to attribute to Congress an intent never contemplated.

II

FAILURE TO CONSIDER THE VALIDITY OF THE UNDERLYING CONTRACT WOULD MAKE THE FEDERAL COURTS PARTIES TO AN ILLEGAL CONTRACT.

Federal courts may not enforce contracts which violate federal law. *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 83 (1982). Since the filing of the Petition, another court has joined the First Circuit and a New Jersey District Court (Petition, p. 13) in holding that an illegal contract cannot be enforced. *Clapesattle v. Sheet Metal Workers, Local 503,* 120 LRRM 3503 (S.D. Ind. 1985).[1]

---

[1] Apparently this case was not officially reported. It was unofficially reported subsequent to the filing of the instant Petition.

Local 302 defends the Ninth Circuit's limiting of *Kaiser Steel* to attacks on particular contractual provisions by merely reiterating the Ninth Circuit's holding that *Kaiser Steel* does not permit the federal courts to interpret the LMRA. (Opposition, p. 10.) Quite obviously, allowing federal courts to enforce contracts which, as a whole, are illegal is inconsistent with the governing principle of *Kaiser Steel.* Applying Section 8(e) of the LMRA (29 U.S.C. §158(e)) to the contract at issue in *Kaiser Steel* required no less an interpretation of the LMRA than does the defense interposed in this action.

Barring judicial enforcement of a contract does not adversely affect the NLRB's jurisdiction to provide *affirmative* relief for violations of the LMRA. *Kaiser Steel, supra,* at 86. The district court properly noted this distinction. (Petition, p. B6.) Nothing in the district court's judgment regulates Local 302's conduct, nor did the district court attempt to provide petitioners with affirmative relief. The Ninth Circuit's reversal puts it squarely in the position of enforcing an illegal contract.

III

NO FACTUAL ISSUES ARE PRESENTED WHICH REQUIRE REVIEW BY THIS COURT.

Aware of the tenuous nature of the Ninth Circuit's reasoning, Local 302 focuses its opposition on a procedural objection. The Union claims that the Ninth Circuit made a factual finding that the Union's statements were not fraudulent. Local 302 reasons that this factual finding constitutes an "independent basis" for sustaining the Ninth Circuit's decision, thus precluding review. (Opposition, p. 7.)

Local 302 errs in classifying the Ninth Circuit's holding as a factual finding. The Ninth Circuit was reviewing a grant of summary judgment based on an uncontroverted factual record. ". . . [I]n granting or denying summary judgment, a district court *by definition* makes a determination of law rather than fact . . ." (Emphasis added.) *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1572 (D.C. Cir. 1984). "For summary judgment, fact finding is an *inappropriate* exercise, at *either* the appellate or district court level." (Emphasis added.) *Lamelson v. TRW, Inc.,* 760 F.2d 1254, 1260 (Fed. Cir. 1985). No factual findings are presented for review.

In any case, Local 302's assertion that "[i]t is inappropriate for this Court to overturn factual conclusions of the courts of appeal . . ." is also incorrect. (Opposition, p. 7.) This assertion is apparently based on the "two court rule" discussed in the treatise cited by Local 302, Wright, Miller and Cooper, *Federal Practice and Procedure,* Vol. 17, § 4036, p. 31 (West, 1978). However, Local 302 fails to state that this rule is inapplicable when the dictrict court and the court of appeal have reached opposite conclusions. *Id.,* pp. 32-33, nn. 82, 84. "Where the court of appeals has reversed the judgment of the district court, the Supreme Court stands in the same position to the district court's findings as did the court of appeals, and may accept the determination of the district court which was reversed by the court of appeals . . ." "Federal Courts", 36 C.J.S. § 204(21), p. 670. Local 302 cannot present review of the important legal principles involved by denominating the Ninth Circuit's conclusions as findings of fact. *See generally Baumgartner v. U.S.,* 322 U.S. 665, 670-671 (1944); and *Offut v. U.S.,* 348 U.S. 11, 15 (1954).

The Ninth Circuit's decision ratifies the right of a union to engage in deceit. Established federal law as well as California law bars such conduct by a fiduciary. (Petition, pp. 17-22). Despite hundreds of years of common law governing the formation of contracts, no case has yet been cited that sanctions the misrepresentations made to petitioners by Local 302. For the first time, a federal court approves the right of a contractual party to engage in deceit. Such a principle has no place in federal jurisprudence, and even less of a place in the lives of common working men in their relationship to their unions.

IV

CONCLUSION

Granting certiorari is necessary to determine (1) whether jurisdiction to consider the validity of the union-member relationship is exclusively commited to the NLRB; and (2) if not, whether a union may fine employees thousands of dollars where it induced the membership obligation through misrepresentations. For the aforesaid reasons, it is respectfully submitted that the prayed for Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian
Counsel of Record

Attorneys for Petitioners

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*, OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
National Right to Work Legal Defense Foundation

22 January 1986

No. 85-1098

IN THE

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners. Respondent has refused consent for the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory-unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; rights to due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States.

To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from joining or supporting labor organizations.* And in numerous on-going cases throughout the country, the Foundation is now aiding employees who have been denied, or coerced or defrauded in the exercise of, their right to refrain from becoming or remaining formal union members, subject to internal union rules and discipline, as a condition of employment.

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Court of Appeals for the Ninth Circuit could seriously undermine the constitutional and statutory rights of individual employees to work free from coerced union membership, and could largely eviscerate the duty of unions to repre-

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* *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984); Minnesota State Bd. for Community Colleges v. Knight, ___ U.S. ___, 104 S. Ct. 1058 (1984); Hudson v. Chicago Teachers Union, Local No. 1, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2700 (1985) (oral argument held 2 December 1985).

sent all employees in a fair and nondiscriminatory manner.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Foundation recognizes that petitioners have fully and ably argued their own, personal interests in having this Court grant a writ of certiorari. Yet, by naturally focussing on their particular circumstances, petitioners may not have sufficiently emphasized the truly nationwide importance of the Court of Appeals' decision in misapplying controlling labor-law doctrines concerning coerced union membership, in jeopardizing the constitutional and statutory rights of individual employees throughout the United States, and in creating the danger of (and, indeed, supplying an excuse for) wholesale future violations of unions' duties of fair representation. Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the immediate significance and potential consequences of the Court of Appeals' erroneous ruling, and of the pressing need for this Court's review thereof by writ of certiorari.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
National Right to Work Legal
Defense Foundation

No. 85-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CRAIG VEVODA, KENNETH CHAMNESS, and MARK SOTTANA,

Petitioners,

v.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae *National Right to Work Legal Defense Foundation*

22 January 1986

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Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of petitioners.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

This Court should issue a writ of certiorari because the Court of Appeals' decision: (i) encourages unions throughout the country to deceive or coerce employees into accepting full union membership as a condition of employment; and (ii) eviscerates the unions' duties of fair representation as far as collective-bargaining agreements providing for compulsory unionism are concerned, in violation of national labor law, the United States Constitution, and every relevant decision of this Court on the subject.

ARGUMENT

The importance of this Court's review of the Court of Appeals' decision lies in that court's candid admission that "[u]ndoubtedly the [petitioners] were under the impression that they had to become union members, since the collective bargaining agreement so stated", juxtaposed to its astounding conclusion that, notwithstanding the *false* and *illegal* "impression" the collective-bargaining agreement foisted on petitioners, petitioners' union membership was *not* induced by misrepresentation and coercion. If this Court allows the Court of Appeals' decision to stand on such patently self-contradictory reasoning, individual employees throughout the United States will suffer increasing impairment of their right to

work free from compulsory union membership; and unions will enjoy a new rationalization for violating the duties of fair representation that they owe to union and nonunion employees alike.

I. Review of this case is necessary to protect the constitutional and statutory rights of individual employees throughout the United States to work free from coerced union membership.

In both private- and public-sector cases, this Court has consistently held that, although an employer and union may agree to condition the continued employment of individual workers on the workers' union membership, "such membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of [union] fees and dues".[1] Thus, under the statute applicable here, petitioners' "'membership' as a condition of employment is whittled down to its financial core".[2] "[S]uch membership", this Court explained in an analogous context,

> encompasses only the financial obligations of union participation and does not include formal union membership. Accordingly, a collective bargaining agreement can require an employee to share in the expenses of union activity; it may not mandate that he actually join the union as a condition of employment.[3]

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[1] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n. 10 (1977).

[2] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), *interpreting* § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3).

[3] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 235-38 (1956),

Whether "financial-core membership" arises out of statutory limitations on the privilege of employers and unions to condition employment on compulsory unionism (as it does under the private-sector National Labor Relations and Railway Labor Acts), or derives from the First Amendment's protection of employees' freedom not to associate with unions (as it does in the public sector generally), its practical significance to individual employees is large. For, by choosing "financial-core membership", an employee can completely remove himself from the jurisdiction of a union's constitution and other internal organizational rules, and thereby from the union supervision, control, and discipline that reaches full-fledged, formal members.[4] Thus, in this case, had respondent afforded petitioners the option of "financial-core membership" that national labor law requires, no justiciable controversy would have ensued after petitioners refused to join respondent's strike.

Unfortunately, respondent did not apprise petitioners of their "financial-core option", choosing instead to exploit their ignorance of the law and their natural misunderstanding of the blatantly misleading language of the collective-bargaining agreement to impose full formal union membership on them through misrepresentation and coercion. Thus, this case constitutes one of an untold — but doubtlessly large — number of situations throughout American industry where, although "collec-

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interpreting § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, which corresponds functionally to § 8(a)(3) of the National Labor Relations Act.

[4] *E.g.*, Pattern Makers' League v. NLRB, ___ U.S. ___, ___ & n.16, 105 S. Ct. 3064, 3071-72 & n.16 (1985); Service Employees Local 680 v. NLRB, 601 F.2d 980, 981 (9th Cir. 1979).

gaining agreements which refer to union membership as a condition of employment cannot be implemented beyond requiring workers to pay the equivalent of union dues", "because this fact is not widely known, numerous workers may be misled into becoming full union members".[5]

Typically, compulsory-unionism clauses in collective-bargaining agreements incorrectly describe employees' obligations to the unions in all-encompassing terms such as "member" or "membership", without any suggestion that as a matter of law these terms may at most import only limited "financial-core membership". As did petitioners here, however, "[t]he average worker, unversed in the tortuous complexities of statutory interpretation, [will] normally construe [the word 'membership'] to mean membership in the colloquial sense—*i.e.*, full membership";[6] and, on the basis of this quite natural misunderstanding, will acquiesce in the full membership that a union could not induce him to accept or impose upon him after a candid disclosure of the facts. Indeed, one need be neither paternalistic nor cynical to recognize, as has this Court, that, "[i]n the labor setting, * * * the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union"[7]—leading to the expectable, if

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[5] Cantor, "Uses and Abuses of the Agency Shop", 59 *Notre Dame L. Rev.* 61, 61 n.2 (1983).

[6] T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* (Lab. Rel. & Pub. Pol'y Series No. 15, 1977), at 69-70. *See also* D. Heldman, J. Bennett, & M. Johnson, *Deregulating Labor Relations* (1981), at 70-71.

[7] Delcostello v. Teamsters, 462 U.S. 151, ____, 103 S. Ct. 2281, 2291 (1983).

not inevitable, result that union self-interest in compelling full membership as a condition of employment, coupled with employee ignorance of the true state of the law, will almost always conjoin to override the employee's will.

That, as far as compulsory-unionism clauses in collective-bargaining agreements are concerned, union representation of and full disclosure to employees are manifestly deficient even the most ardent defenders of unions concede. None other than eminent labor-attorney Joseph L. Rauh, Jr. criticized "[t]he labor movement" for

> never own[ing] up to the fact that nobody has to belong to a union in this country. No law requires anyone to belong to a union. The only thing required is that a person pays his dues so he gets the benefits of the union. *But labor hides that fact. A labor union doesn't advertise the agency shop.*[8]

Yet the law is crystal-clear that unions owe employees a fiduciary duty to inform those employees of their *exact* obligations under compulsory-unionism agreements.[9] The notorious discrepancy between this duty, and what unions actually do to circumvent their responsibilities in most situations, points up the unions' fear that, if employees actually understood their rights, most would

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[8] BNA Daily Labor Rpt., Current Developments Section, No. 17, 25 January 1978, at A-3 (emphasis supplied).

[9] *E.g.*, NLRB v. Teamsters Local 291, 633 F.2d 1295, 1298-99 (9th Cir. 1980). *See, e.g.*, Electrical Workers (IUE) Local 801 v. NLRB, 307 F.2d 679, 683-84 (D.C. Cir.) (opinion by Burger, J.), *cert. denied*, 371 U.S. 936 (1962).

choose the "financial-core membership" the labor laws offer. And, derivatively, it points up the presumptive (if not conclusive) illegality of every compulsory-unionism agreement throughout the United States the "financial-core option" of which unions have not fully and fairly explained to the employees affected.[10]

Here, absent reversal by this Court, the Court of Appeals' decision will provide a perverse precedent rationalizing, both within the Ninth Circuit and elsewhere, a new excuse for continuing judicial enforcement of thousands of compulsory-unionism agreements that, if not invalid on their faces, are certainly inapplicable as against employees whose full union membership was the product of their misunderstanding of the law, induced by the careful silence (or self-serving "ignorance") of union officials. That this result violates the National Labor Relations Act goes without undue emphasis, having been held to offend the statute time and again at every level of the judicial and administrative systems. That it will also violate the Constitution requires no extraordinary process of reasoning, either.

Where, as here, a union sues a purported "member" to collect an *unlawful* fine, the "suit * * * has an objective that is illegal under federal law".[11] Specifically in this case, the fines respondent sought to collect were unlaw-

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[10] *See, e.g.*, Retail Clerks Internat'l Ass'n, 226 N.L.R.B. 80, 89-90 (1976) (absent evidence that union advised employees of "financial-core option", "it must be held that the employees joined [the union] under [illegal] compulsion").

[11] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, ___ n.5, 103 S. Ct. 2161, 2167 n.5 (1983).

ful, because petitioners' membership in the union (the necessary predicate for the imposition of any fines) the union itself illegally obtained in the first instance through misrepresentation and coercion. Yet the Court of Appeals held that respondent may nevertheless sue to collect these unlawful fines, with immunity from petitioners' otherwise dispositive defense under federal labor law, because it claims "ignorance" of the illegality of its earlier requirement that petitioners become its full, formal members. If this Court allows the Court of Appeals' decision to stand, it will inadvertently countenance, in this and other cases applying this case as precedent, a clear-cut violation of the Due Process Clause of the Fifth Amendment to the United States Constitution (where a federal court entertains such a fine-collection suit with "an objective that is illegal under federal law") or of the Supremacy Clause of the Constitution[12] (where a state court entertains such a suit).

Thus, whether viewed as an attempt to circumvent the limitations on compulsory unionism imposed by section 8(a)(3) of the National Labor Relations Act, or as an arrant disregard of the provisions of the Constitution absolutely mandating that those limitations be recognized and enforced in the federal and state courts, the decision of the Court of Appeals cries out for this Court's intervention by writ of certiorari.

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[12] U.S. Const. art. VI, cl. 2.

II. Review of this case is necessary to prevent unions from violating the duties of fair representation they owe to individual employees.

The Court of Appeals' silence on respondent's violation of its duty of fair representation to plaintiffs in this case provides further support for the issuance of a writ of certiorari. The court's reticence on this issue is inexplicable because: (i) that duty imposes on every union an affirmative obligation to inform employees subject to a compulsory-unionism agreement of the substantive and procedural limitations of federal labor law on such agreements; and (ii) the strictness with which the courts must enforce that duty partakes of its *quasi*-constitutional nature and importance.

In the case that first fashioned the duty of fair representation, *Steele* v. *Louisville & Nashville Railroad Co.*,[13] this Court held that the creation and enforcement of that duty was necessary to avoid serious constitutional questions arising from national labor law's grant to unions of the status of exclusive collective-bargaining agents for non-consenting employees. In addition to holding that the status of exclusive bargaining-representative "imposes upon [a union] at least as exacting a duty to protect equally the interests of [all employees] as the Constitution imposes upon a legislature to give equal

[13] 323 U.S. 192 (1944). Although *Steele* arose under the Railway Labor Act, on the very same day it decided *Steele* this Court imposed the duty of fair representation on unions acting as exclusive collective-bargaining agents under the National Labor Relations Act. Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944). Significantly, this decision arose under the predecessor to § 8(a)(3) of that act.

protection to the interests of those for whom it legislates", the Court further emphasized that national labor law

> require[s] the union, in collective bargaining and in making contracts with the [employer], to represent non-union * * * [employees] without hostile discrimination, fairly, impartially, and in good faith. Whenever necessary to that end, the union is required * * * to give [non-union workers] notice of and opportunity for hearing on its proposed action.[14]

Thus, *Steele* recognized that the duty of fair representation embodies a requirement that unions afford the employees they represent a right akin to procedural due process of law.

In a case such as this, the procedural-due-process aspect of the duty of fair representation self-evidently includes providing employees both a clear explanation of the limitations on compulsory unionism mandated by section 8(a)(3) of the National Labor Relations Act,[15] and a fair opportunity for workers to exercise their option to select "financial-core membership" if they desire. Yet the Court of Appeals' decision—without even alluding to the issue—eviscerates the procedural-due-process content of the duty of fair representation, licensing respondent (and other unions similarly situated and motivated) to remain silent when they have an affirmative duty to speak, to misrepresent employees' obligations through the calculated use of deceptive language in

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[14] 323 U.S. at 202, 204.

[15] *See* Teamsters Local 162 v. NLRB, 568 F.2d 665, 669 (9th Cir. 1978).

collective-bargaining agreements, or (as here) to do both. A result more blatantly at odds with *Steele*, and with the constitutional imperatives informing that decision, would be difficult to imagine, and cannot receive this Court's silent approbation.

CONCLUSION

For the foregoing reasons, the Foundation urges this Court to grant the petition and issue a writ of certiorari.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
National Right to Work Legal Defense Foundation

that officials of Local 302 'lied' to the defendants or 'actively misled' them into joining the union. Their affidavits recite that a receptionist handed Vevoda and Sottana membership forms and an officer administered the oath required for membership in the Local. No representative of the union ever told any of the defendants that they would be fired if they resigned from full-fledged union membership and merely paid dues. It does not appear that anyone, plaintiff or defendants, ever thought of such a possibility during the period in question. Undoubtedly the defendants were under the impression that they had to become union members, since the collective bargaining agreement so stated. But there is no suggestion that any union representatives had any knowledge of the gloss which the NLRB and the courts have superimposed upon the statutes authorizing such clauses. Indeed it would have been unreasonable to expect the union agents to have any such knowledge in this case. It was not until 1979, the year after the strike occurred (though several years before these defendants asserted their defense), that this circuit decided that a union could not require full-fledged union membership under union security agreements similar to that under which these defendants were working. *United Stanford Employees*, 601 F.2d 980."

In summary, the Court concluded that the District Court's decision could not stand whether "principles of federal labor law or California fraud law" were to apply (*ibid.*).

REASONS FOR DENYING THE PETITION

1. The Court of Appeals reversed the summary judgment entered in favor of Petitioners on two grounds. One of these grounds rests upon the evaluation of the court below of facts presented by Petitioners in the documents supporting their motion. Petitioners had argued, based on their uncontroverted affidavits, that the Union had fraudulently misled them into accepting Union membership which they did not want, under fear that they would otherwise lose their jobs. This argument, which is accepted as a presupposition of the questions Petitioners seek to present to this Court (Pet. p.i), and is repeated in the Petition itself (Pet. pp. 17-22), has been rejected by

the court below as simply unsupported by the underlying affidavits (Pet. App., A, p.7).

The question presented on this branch of the case thus involves a factual dispute. The premise for Petitioners' position is destroyed if, as concluded by the court below, the Union made no misrepresentation of any kind to Petitioners in connection with their acquisition of Union membership. Accordingly, before Petitioners can properly submit to this Court the legal question of whether they were released from their obligations of Union membership because of the Union's fraudulent conduct, they must first demonstrate that the Court should reject the finding that there was no misrepresentation.

It cannot be gainsaid that the Court of Appeals was acting within its proper province in reviewing *de novo* the District Court's conclusion that the Union was guilty of misrepresentation. On appeal from the entry of a summary judgment, the federal courts of appeal are free to draw their own conclusions from underlying facts about which the district courts find that there is no genuine dispute. *Thrasher v. State Farm Ins. Co.*, 734 F.2d 637, 638 (1984); c.f. *United States v. Diebold*, 639 U.S. 654, 655 (1962). It is inappropriate for this Court to overturn factual conclusions of the courts of appeal in such cases. See, Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol.17, Section 4036, p.31 (West 1978).

The foregoing analysis is sufficient to dispose of the Petition in its entirety. Although the Petitioners also present a question of the preemptory jurisdiction of the National Labor Relations Board, a question discussed below, the ruling of the court of appeals that the Union was not guilty of misrepresentation constitutes an independent basis for sustaining its decision. Accordingly, this case is not appropriate for a grant of certiorari to review the preemption question.

2. The conclusion of the Court of Appeals that the District Court was without jurisdiction to entertain Petitioners' contentions dealing with alleged misconduct of a union in compelling membership under a union security clause is in any event correct and should not be disturbed.

The central thesis of Petitioners' position is that the obligations of union membership are not enforceable when acquired pursuant to a compulsory membership clause in a collective bargaining agreement, but under pressure of union misrepresentations concerning the requirements of the clause. The validity of this argument is necessarily measured by the principles of federal law governing union security clauses.

The circumstances under which a union may require union membership as a condition of employment and the scope of membership obligations which are incurred under a union security clause are the subject matter of comprehensive regulation under Sections 7, 8(a)(3) and 8(b)(2) of the National Labor Relations Act. Thus, a union violates the Act, if it causes the discharge of an employee for failure to pay current dues without first advising the employee as to the amount he owes, the consequences of nonpayment, and affording him an opportunity to make payment. *NLRB v. Teamsters Local 291*, 633 F.2d 1295 (C.A.9, 1980). This ruling reflects the principle that a union has "a fiduciary duty . . . [to] deal fairly with employees . . ." in areas where their job security is involved, and to provide such information to them as will enable them to "take whatever action is necessary to protect [their] job tenure." *NLRB v. Hotel Employees Union Local 568*, 320 F.2d 254, 258 (C.A.3, 1963). Similarly, a union commits an unfair labor practice under the Act by taking action to enforce a union security agreement where tender of dues is made, but the employee declines to take the oath of membership. *Union Starch and Refining Co. v. NLRB*, 186 F.2d 1008

(C.A.7, 1941). Here again, the union had acted in a manner that exceeds the carefully circumscribed area which is allowed it under Section 8(a)(3) of the Act. Another example of the Act's proscriptions in enforcing compulsory membership agreements—an example analogous to the facts in this case—is a union's efforts to compel full-fledged membership and its refusal to accept resignations from membership by those who seek to avoid full membership obligations. *Service Employees Local 680 v. NLRB*, 601 F.2d 980 (C.A.9, 1979). For cases dealing with the Act's regulation of efforts to escape internal union discipline through resignation from membership, see, e.g., *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), and *Pattern Makers League v. NLRB*, 473 U.S. ___, 87 L.Ed 2d 68, (1985). It may be added that the basic proposition that the Act does not prohibit union fines for crossing picket lines was established many years ago in *NLRB v. Allis-Chalmers*, 388 U.S. 174 (1967).

From the foregoing it is clear that the nature and scope of a union's obligations in the administration of a union security agreement are measured by federal law embodied in the National Labor Relations Act and administered by the National Labor Relations Board. In arguing that the Union in this case was guilty of misleading conduct in failing to inform Petitioners that they are not required to become formal Union members in order to comply with the applicable union security agreement, Petitioners are simply asserting that the Union was guilty of an unfair labor practice. It may quickly be added that in the many years the Board has dealt with the myriad questions arising in union security cases it has never held that unions are obliged to inform employees subject to compulsory membership clauses that they may forego formal membership so long as they pay the equivalent of dues and fees. Arguably, the question could be resolved either way, but it has long been established that a determination of this kind is exclusively for the Board to make. *Building*

Trades Council v. Garmon, 359 U.S. 236 (1959); *Machinists v. Wisconsin Commission*, 427 U.S. 132 (1976).

This Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), is not to the contrary. The preemption doctrine was held not to preclude the defendant in that case from asserting as a defense in a collection suit that the contract under which it was obligated to make payments to an employee benefit fund was invalid under Section 8(e) of the Act, and therefore an unfair labor practice. An agreement which violates Section 8(e) is a contract with respect to which courts generally have concurrent jurisdiction under Section 301 of the Act. See, *Smith v. Evening News Association*, 371 U.S. 195 (1962). Section 301 jurisdiction, however, does not negate the exclusivity of the Board's jurisdiction in respect to conduct which relates not to matters of contract interpretation, but to the interpretation of the National Labor Relations Act and the application of federal labor policy. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971); *Glaziers Local 767 v. Custom Auto Glass*, 689 F.2d 1339 (1982). The question which Petitioners raised in the District Court requires evaluation of "a union's dealings with employees about union membership . . . [which is] conduct closely regulated by sections 7 and 8 of the NLRA" (Pet. App. A p.5). The *Garmon* principle is accordingly controlling.

3. Petitioners' contention that the decision below conflicts with decisions dealing with federal preemption in other circuits is without merit.

Marden v. IAM, 576 F.2d 576 (C.A.5, 1978), cited at page 10 of the Petition, does not deal with a preemption question. The case arose under the Railway Labor Act, 45 U.S.C. Sections 151, *et seq.* which does not contain unfair labor practice provisions, the enforcement of which is vested in a federal agency, as is the case with the National Labor Relations Act. Its provisions are enforced by the

federal courts, which have plenary jurisdiction to deal with alleged violations. Manifestly, the same principles of preemption which are established with respect to the National Labor Relations Board have no application.

Beck v. Communications Workers, ___F.2d___, 120 LRRM 2957 (C.A.4, 1984), concerns the uses to which a union may put money derived from dues and fees under an agency shop provision. Accepting the Court's view in that case that an inappropriate use of union funds constitutes a violation of the duty of fair representation, the decision nonetheless had no bearing on the claims which Petitioners have made in this case. The doctrine of fair representation protects employees from "arbitrary union conduct against employees when the union provides the employees' only redress against the employers." *Archer v. Airline Pilots Association*, 609 F.2d 934, 939 (C.A.9, 1979). Petitioners' protest against the Union in this case is based neither on the negotiation of a collective bargaining agreement on their behalf nor the handling of a grievance which the Union controls by virtue of its status as their exclusive representative. This distinction renders inapplicable other decisions cited by Petitioners (Pet. p.12) in which federal district court jurisdiction rests upon their authority to entertain unfair representation issues. Compare, *Vaca v. Sipes*, 386 U.S. 171 (1967).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

January 21, 1986.

BEESON, TAYER & SILBERT
DUANE B. BEESON
(Counsel of Record)

Attorneys for Respondent

APPENDIX

The following provisions of the National Labor Relations Act (29 U.S.C. Sections 151 et seq.) are relevant to the issues in this case.

Section 8(a)(3):

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b)(2):

> (2)To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on

some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;